United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7039

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To be argued by
M. KATHRYN MENG

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
DOCKET NO. 76-7039

- -x

BISWANATH HALDER,

Plaintiff-Appellant,

-against-

AVIS RENT-A-CAR SYSTEM, INC.,

Defendant-Appellee.

- -x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES:

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

BISWANATH HALDER, :

Plaintiff-Appellant, :

-against- : Docket No. 76-7039

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STATEMENT OF ISSUE

Whether the District Court was correct in denying a preliminary injunction to plaintiff in the present situation.

STATEMENT OF CASE

Plaintiff, Biswanath Halder, alleges employment discrimination in violation of 42 USC 2000 e, et. seq. based upon national origin.

The attempts by plaintiff to amend his complaint to include discrimination based on color and religion and to include an additional date of discrimination of June 1975 have been denied - Memorandum Decision and Order of Judge Mishler dated January 22, 1976.

Plaintiff alleges that in July 1970 he sent a resume to defendant seeking employment and received no response. He then alleged that he sent another resume in February 1971 again with no response. In March 1971 a charge was filed with the Equal Employment Opportunity Commission (EEOC) and pursuant to Statute was referred to the New York State Division of Human Rights which on July 23, 1971 requested plaintiff to contact them. Plaintiff failed to contact them and on December 5, 1972, one year and five months later, plaintiff swears to the EEOC charge. On February 2, 1973, the EEOC rendered its determination of no reasonable cause and so notified plaintiff. Plaintiff took no action until one year six months later when he requested a "Notice of Right to Sue" which was sent to him on September 4, 1974. The within action was commenced on November 7, 1974. Annexed hereto as Schedule I is a list of the pertinent dates for the Court's convenience.

Plaintiff has alleged no discriminatory practice of defendant that should be enjoined. He merely alleges that since he was admitted into this country under a Class 3 preference, 8 USCA 1153(a)(3), and has been unemployed, he must have been discriminated against.

ARGUMENT

THE COURT SHOULD AFFIRM THE DENIAL OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

The Court has the power to issue a preliminary injunction in Civil Rights' cases if it finds that "respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint. . ." 42 U.S.C. 2000e-5(g).

As stated in Canal Authority of State of Florida v. Callaway, 489 F. 2d 567, at p. 572,

> "The district court does not exercise unbridled discretion, however. It must exercise that discretion in light of what we have termed 'the four prerequisites for the extraordinary relief of preliminary injunction.' Allison v. Froehlke, 5 Cir. 1972, 470 F. 2d 1123, 1126. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. DiGiorgio v. Causey, 5 Cir. 1973, 488 F. 2d 527; Blackshear Residents Organization v. Romney, 5 Cir. 1973, 472 F. 2d 1197."

The Court also emphasized, at p. 573, that

> "In considering these four prerequisites, the court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. The primary justification for applying this remedy is to preserve the court's ability to render a meaningful decision on the merits." (emphasis added).

The plaintiff herein has not met his burden to show any of the four prerequisites required for the issuance of an injunction.

1. Is there a substantial likelihood that plaintiff will prevail on the merits?

Plaintiff alleges nothing more than that defendant failed to employ him requesting the Court to infer from this that he was discriminated against because of his national origin since he was born in India.

He alleges no discriminatory testing program, educational requirements, recruitment programs, exclusion policy, or pattern of past discriminatory policies or practices. There is no "practice or policy" which plaintiff can even request the Court to enjoin except the "practice or policy" of not hiring him. From the failure to hire him plaintiff concludes

that he has been discriminated against. Yet, this is not the only conclusion which can be drawn from the facts stated by plaintiff. It is equally possible to conclude that plaintiff was not qualified for any position for which he has applied. As stated in the affidavit of Daniel P. McConnell, sworn to July 31, 1975, in support of defendant's motion to dismiss and for judgment, defendant claims that plaintiff was not qualified for any available position for which he applied.

Further, 42 U.S.C. §2000e-5(g) emphatically and specifically states that:

> "No order of the court shall require. . . the hiring. . .of an individual as an employee . . . if such individual. . .was refused employment. . . for any reason other than discrimination on account of. . .national origin."

Based on the affidavit of Daniel P. McConnell, there exists a reason for refusal of employment other than discrimination. Thus, the facts alleged by plaintiff are insufficient to show a substantial likelihood that he will prevail on the merits.

2. Has plaintiff shown a substantial threat of irreparable injury?

Plaintiff has the burden to show a threat of irreparable injury.

Since injunctive relief is normally used to maintain the status quo pending trial of the action, to protect the

plaintiff from irreparable injury and to preserve the District Court's power to render a meaningful decision after a trial on the merits, Canal Authority of State of Florida v. Callaway, supra, an injunction should not issue in the factual situation involved herein.

Plaintiff is not and has never been an employee of defendant. An injunction ordering defendant to hire plaintiff at this stage of the proceeding will drastically change the status quo. Without the issuance of an injunction, the Court will still have the power to render a meaningful decision after a trial on the merits. In fact, in order to protect the defendant's right to a trial on the merits, an injunction should not issue.

Citing numerous cases, plaintiff claims that the Court should presume that irreparable injury will occur because the statute has been violated. However, it is clear from reading the cited cases that irreparable injury is only presumed in those cases where there exists facts which clearly show unlawful employment practices. Such facts do not exist in this case; plaintiff simply requests the Court to infer a violation of the statute. After inferring a violation, the Court is then requested to presume a threat of irreparable injury. A presumption based on an inference from facts which are reasonably subject to

different conclusions is insufficient to show irreparable injury and a right to the "extraordinary and drastic" remedy of a preliminary injunction.

Further, in Jerome v. Viviano Food Co., Inc., 489 F. 2d 965, the Court, after discussing compliance with the statutory requirements prerequisite to institution of a civil suit, held that plaintiff was not entitled to a preliminary injunction, stating, at page 966,

> "In the instant case there is no existing relationship between the employee and the employer, and monetary damages in the form of back wages can compensate for the injury. These facts serve as valid distinctions in terms of the proofs essential to establish irreparable harm between the instant case and the Drew case."

In cases cited by plaintiff where injunctions were issued, the plaintiffs were either former or present employees who were complaining of discrimination in firing or promotion or qualified persons who were applying for membership in an organization which had long established exclusionary membership policies or were situations where there was a well-defined and documented policy or practice the enforcement of which was enjoined. Plaintiff herein is not a former or present employee and has shown no discriminatory policy or practice of defendant,

Avis. Clearly, plaintiff has not shown irreparable injury and is not entitled to an injunction.

3. Does the threatened injury to plaintiff outweigh the threatened harm the injunction may do to defendant?

Plaintiff implies that the granting of an injunction ordering defendant to hire him will cause no harm to defendant "as it would receive his services as a Programer/Anaylst in return for the salary it pays him."

This claim is so outrageous that it should not need response. If defendant prevails in this action, it will have paid for services of an unqualified person. It is ridiculous to believe that this does not harm defendant. The complexities involved and the problems even a minor error can cause in the computer field are well-known. Defendant could suffer the loss of substantial business clients and its business reputation.

In addition, the morale of defendant's other employees could and probably would be affected.

If plaintiff were to prevail after trial, the Court has the power to order compensation for the injury done to plaintiff by payment to him of damages including back pay. The threat of injury to plaintiff does not outweight the threatened injury to defendant and plaintiff has shown no right to the issuance of a

preliminary injunction.

4. Does the granting of a preliminary injunction serve the public interest?

The Civil Rights Act under which plaintiff brings his action was passed to prevent discrimination based on race, creed, color and national origin. The act does not provide for the hiring of an unqualified person because he is of a particular race, creed, color or national origin. First, he must be qualified; this has always been the public policy.

Clearly, the granting of an injunction at this stage of the proceeding requiring defendant to hire plaintiff where there still exists a question as to whether plaintiff is qualified or not, is not in the public interest and would cause a great disservice to the economic community as a whole.

THE DISTRICT COURT JUDGE HAS
NOT ABUSED HIS DISCRETION IN
DENYING A PRELIMINARY INJUNCTION.

Plaintiff has presented no facts which would show an abuse of discretion on the part of the trial judge. The judge is fully familar with this matter, the claims made by plaintiff herein, and the claims made by plaintiff in the numerous other cases brought by him in the District Court alleging identical facts. See Memorandum Decision and Order dated January 22, 1976, footnote 4, page 4.

Plaintiff claims he was admitted to this country "as a member of a profession for which there is an available market for his professional services" (emphasis added) citing 8 U.S.C.A. 1153(a)(3). In this he totally misreads the statute which states:

> "(3) Visas shall next be made available...to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interest, or welfare of the United States."

There is no statement in the statute that implies that there is a market for his services. See, in contrast, 8 U.S.C.A. 1153(a)(6) which states:

> "(6) Visas shall next be made available...to

> qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States."

This Court should take judicial notice of the fact that after 1970 the unemployment rate in this country increased drastically and, in the area of computer programer/analysts, the employment market reached a saturation point. The Court should further note the fact that, as to the Class 6 preferences, the Department of Labor is constantly revising its list of those jobs in which there exists a shortage of employable and willing persons.

Furthermore, the Court should examine the resume submitted by plaintiff, Exhibit A to Notice of Cross Motion dated August 25, 1975. It clearly indicates that plaintiff was employed when admitted to this country and voluntarily left his job to "vacation in India". Upon his return to this country he was employed for a three month period. Upon leaving that employment plaintiff initiated his various Civil Rights complaints against defendant herein and other major companies in this area, Exhibit B to Notice of Cross Motion dated August 25, 1975. An examination of this resume shows a total lack of career orientation, work history and job stability, four different jobs in a three year

period of time between August 1967 and July 1970, which alone is sufficient to cause a potential employer to hesitate.

Plaintiff's disagreement with statements made by defendant's personnel officer, Daniel P. McConnell, as to his qualifications for employment does not constitute perjury nor has Mr. McConnell been convicted of perjury as implied by plaintiff's citation of 18 U.S.C. 1623. As the lower court was aware, plaintiff has made allegations of perjury against defendant and its attorneys every time he disagreed with defendant's position.

The Judge was unquestionably aware of plaintiff's delaying tactics, see Schedule I, and his numerous applications to amend his complaint and for reargument of his motion to compel answers to interrogatories.

In the sound exercise of his discretion the Judge has denied the issuance of a preliminary injunction and this denial should be affirmed.

CONCLUSION

THE DISTRICT COURT JUDGE WAS CORRECT AND HAS NOT ABUSED HIS DISCRETION IN DENYING ISSUANCE OF A PRELIMINARY INJUNCTION AND THE ORDER DENYING THE PRELIMINARY INJUNCTION SHOULD BE AFFIRMED.

Respectfully submitted,

MEYER, ENGLISH & CIANCIULLI, P.C.
Attorneys for Defendant

SCHEDULE I

TABLE OF DATES

July 20, 1970	Alleged that resume sent - no reply received, amended complaint Par. 5(A)
February 14, 1971	Alleged that resume sent - no reply received, amended complaint Par. 5(B).
May 10, 1971	Filed charge with EEOC. Exhibit A.
May 20, 1971	EEOC refers charge to NYS Division of Human Rights. Exhibit E.
July 23, 1971	NYS Div. of Human Rights requests Halder to contact them. Exhibit F.
December 5, 1972	Halder swears to EEOC charge, Exhibit A.
February 2, 1973	EEOC determination. Exhibit B.
December 5, 1973	Resume sent, rejection received. Amended complaint Par. 5(C) & Exhibit G.
January 13, 1974	Resume sent, rejection received. Amended complaint Par. 5(D) & Exhibit H.
July 22, 1974	Request for Notice of Right-to-Sue. Exhibit C.
September 4, 1974	Notice of Right-to-Sue. Exhibit D.
November 7, 1974	Commencement of Action.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

Marilyn L. Monell

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Garden City, New York 11530.

That on the 2nd day of April 19 76

deponent served the within [illegible]

upon [illegible]

attorney(s) for Plaintiff in Person

in this action, at 173-17 90th Avenue, Fresh Meadows, New York 11365

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within New York State.

Plaintiff in Person

Marilyn L. Monell

Marilyn L. Monell

Sworn to before me,
this 2nd day of April 1976

M. Kathryn Meng

M. KATHRYN MENG
NOTARY PUBLIC, State of New York
No. 30-7806800
Qualified in Nassau County
Commission Expires March 30, 1978